Supreme Court, U.S.
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No. 00-853

In The

Supreme Court of the United States

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE,

Petitioners,

v.

RONALD NUSSLE,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Second Circuit**

RESPONDENT'S RESPONSE TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the Court of Appeals erroneously conclude, contrary to other Courts of Appeals, that an inmate bringing a claim for excessive force need not have exhausted administrative remedies pursuant to the Prison Litigation Reform Act's mandatory exhaustion requirement of 42 U.S.C. § 1997e(a)?

LIST OF PARTIES

In both the United States District Court for the District of Connecticut and the United States Court of Appeals for the Second Circuit, the Plaintiff was Ronald Nussle.

In both courts below the defendants are listed as Correction Officer Willette and Correction Officer Porter.

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RESPONDENT'S RESPONSE TO PETITIONERS' PETITION FOR WRIT OF CERTIORARI

The Respondent, Ronald Nussle prays that this Court deny the Petitioners' writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

JURISDICTION

The United States Court of Appeals for the Second Circuit entered judgment on August 24, 2000.

The respondent believes that the petitioner's recitation of the jurisdictional statement is correct and that the jurisdiction lies in this Court at this time.

STATEMENT OF THE CASE

The respondent adopts the petitioner's statement of the case.

REASONS FOR DENYING THE WRIT

The Court of Appeals' decision in this case creates a split in the circuits on the issue of exhaustion of administrative remedies in the Prison Litigation Reform Act. However, this Court does not have pending before it a writ of certiorari on the issue directly on point in this case, to wit, whether exhaustion is required in an excessive force case because of the character of the claim

raised. Because the Court of Appeals correctly decided this issue, this Court should deny certiorari thus signaling to other circuits that the Second Circuit decision was correctly decided.

I. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DIRECTLY DECIDED THIS ISSUE AND THE ISSUE HAS NOT BEEN BROUGHT BEFORE THIS COURT ON A WRIT OF CERTIORARI FROM ANY OTHER CIRCUIT, THEREFORE REFUSING TO GRANT CERTIORARI IN THIS CASE WILL SIGNAL THAT THE DECISION WAS CORRECTLY DECIDED BY THE SECOND CIRCUIT.

Although the issue in this case was an issue of first impression in the Second Circuit, other circuits have decided the issue. Uniformly, those circuits rejected the position held by the Second Circuit. Interestingly, none of the parties claiming aggrievement in those cases successfully sought a Petition for Certiorari from this Court on the issue decided by the Second Circuit. Thus, although there is a split of authority among the circuits, this Court can, by upholding the Second Circuit decision, signal to the other circuits that this case was correctly decided.

This Court currently has been granted a writ of certiorari with regard to the case of *Booth v. Churner*, 206 F.3d 289, 293, 298 (3d Cir. 2000), cert. granted on other grounds, no. 99-1964 (October 30, 2000). In *Booth*, the issue before the Court is what exhaustion is required when the remedies that are available in an administrative procedure are not identical to the remedies available at

law. Thus, in *Booth*, the Third Circuit rejected a claim that because an administrative remedy procedure did not offer money damages, a prisoner was not obliged to exhaust administrative remedy.

The mere fact that this court has granted certiorari in *Booth* does not obliged it to grant certiorari in this case. It is possible that this Court will rule in *Booth* that because the petitioner in *Booth* was unable to obtain money damages by way of administrative procedure, that exhaustion is not required as a matter of law under the Prison Litigation Reform Act. Should the Court rule in that manner, given the fact that money damages are not available in the case at bar, *Booth* would effectively govern the Nussle case. Thus, if the Court grants certiorari in *Booth*, and rules against the proposition that exhaustion is required in each Prison Litigation Reform Act claim, the petitioners' request for certiorari in this case would be moot.

Alternatively, should the Court deny certiorari in *Booth*, it could nonetheless deny certiorari in this case without addressing the merits of the petitioners' argument. On this theory, failure to grant the writ of certiorari would signal to other circuits that the Second Circuit decision was not error. Of course, permitting things to remain in that awkward position might yield a further writ of certiorari from a petitioner in a circuit in which the law of the circuit already holds that exhaustion is required. However, that would be a topic for another day.

II. THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT'S DECISION DOES NOT CONFLICT WITH *McCARTHY V. BRONSON*

The petitioner makes much of the alleged inconsistency of the Second Circuit's decision in the Nussle case with this Court's ruling in *McCarthy v. Bronson*, 500 U.S. 136, 111 S.Ct. 1737 (1991). Our Courts are not required to remain blind to legislative purpose and history when interpreting a statute. The petitioner seeks to persuade the Court that the Second Circuit erred in concluding that language applicable to the preservation of judicial resources was somehow applicable to cases involving violence against prisoners by state actors. The Second Circuit unambiguously concluded that the structure and the purpose of the Prison Litigation Reform Act was to deter frivolous litigation. There is nothing frivolous about a claim that a prisoner has been maliciously and sadistically abused by a prison guard.

As the Second Circuit concluded, the "structure, purpose and legislative history of the Prison Litigation Reform Act provide ample justification for not treating excessive force or assault claims" in the same manner as are treated claims about such things as the type of food or clothing that prisoners are required to wear. (See petitioner's brief at A17).

The mental state required to prove a case of unreasonable force against a corrections officer is the most culpable under the law. A prison guard who abuses a prisoner by means of excessive force is as a matter of law someone who engages in sadistic behavior. *Farmer v. Breenan*, 511 U.S. 825, 835-36 (1994). It is inconceivable

that Congress intended in the Prison Litigation Reform Act to apply the same standard that it deemed applicable to the conservation of the judicial resources to protection of the least vulnerable citizens within our society. There is nothing in the brief recited by the petitioner, nor in the legislative history relied upon, to support the contention that a prisoner who believes he has been made the target of sadist and malicious force needs to exhaust administrative remedies.

CONCLUSION

For all of the foregoing reasons, this Court should deny the petitioner's request for certiorari.

Respectfully submitted:

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